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Qualification of Drivers; Exemption Applications; Vision
Notice of Applications for Exemption from the Vision Standard
68 Fed. Reg. 52811, September 5, 2003

Introduction

Advocates for Highway and Auto Safety (Advocates) files these comments in response to the Federal Motor Carrier Safety Administration (FMCSA) notice of applications for exemptions from the federal vision standard, title 49 Code of Federal Regulations (C.F.R.) ' 391.41(b)(10). 68 Fed. Reg. 52811 *et seq.* (September 5, 2003). Advocates does not comment on the merits of the individual applications or the specific qualifications of the 30 drivers except as necessary to exemplify problems in the quality and quantity of the information provided regarding the applications, the agency=s presentation of the information to the public, and the process adopted by the agency for evaluating the petitions and for making determinations to grant or deny the exemptions.

Advocates files these comments for several purposes. We comment in order to: clarify the consistency of the exemption application information provided by FMCSA to the public; object to the agency=s misplaced reliance on conclusions drawn from the now defunct Vision Waiver Program; point out the inadequacies of the agency=s procedures; address the agency=s misinterpretation of existing law regarding the statutory standard governing exemption determinations; and place in the administrative record of this proceeding the pertinent portions of a ruling of the U.S. Supreme Court that directly bear on the legal validity of vision exemptions and the agency=s exemption policy.

The Federal Motor Carrier Safety Improvement Act of 1999

Over the past ten years, an average of more than 5,000 people have been killed annually in commercial motor vehicle (CMV, or truck and bus) related crashes. While recent data indicate a slight downturn in total deaths over the past two years, and despite the marginal drop in fatality rate, the absolute number of people killed in CMV-related crashes has remained relatively steady for the last decade. In addition, many tens of thousands of motor carriers have not been given any safety rating by the FMCSA and timely communication of information about operator violation and conviction records is still inadequate. A number of crashes involving motor coaches in recent years, as well as the issuance of the final rule revising the driver hours-of-service regulations -- permitting substantially longer maximum hours of driving -- have heightened awareness regarding motor carrier and operator safety. In addition, Congress expressed its concern for safety on our nation=s highways and specifically determined that there is a need for new leadership and oversight in the regulation and stewardship of commercial motor vehicle operations. Toward that end, the Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, 113 Stat. 1748 (Dec. 9, 1999) (hereinafter Safety Improvement Act or Act), created a new commercial vehicle safety agency, the FMCSA, within the U.S. Department of Transportation.

The Safety Improvement Act was intended to significantly enhance the oversight and safety of commercial motor vehicles. The Act created the FMCSA as an agency primarily, if not singularly, devoted to commercial motor carrier safety. The premise of the Act and the reason for establishment of the FMCSA was that a new safety agency, with expanded resources and funding dedicated to the safety of commercial motor vehicle operations, could advance the safety improvements intended by Congress, as well as achieve the DOT=s 10-year goal of reducing motor carrier related fatalities by 50 percent by 2009, from the 1998 fatality level.

The Safety Improvement Act changed the fundamental manner in which federal authorities regulate motor carriers. Congress identified in the findings section of the Act a list of major problems with the existing federal oversight of commercial vehicles that needed to be corrected. In order to implement these statutory findings and purposes, Congress explicitly enshrined safety as the agency=s mission and highest priority. The Act states that the FMCSA Ashall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation.@ Safety Improvement Act, Section 101(a), *codified at* 49 U.S.C. ' 113(b). Not only is safety the agency=s highest priority, it is the paramount goal which the agency is required to achieve in all of its actions and functions. The statute provides a clear mandate to the FMCSA to advance motor carrier safety as its primary mission.

As a consequence of the unequivocal wording and clear meaning of the Safety Improvement Act, the agency must justify each of its actions based on its measurable safety impact. In the Act, Congress set an overarching standard for motor carrier operations B the highest degree of safety. Establishment of the FMCSA was intended to ensure that this pre-eminent standard of safety is achieved through agency policy choices and other actions. Thus,

FMCSA is authorized to improve safety not merely to a greater extent than existed before, but to promote the Ahighest degree of safety in motor carrier transportation.@ *Id.* This means that safety must be the rationale for agency plans, analyses, and programs, and that the FMCSA must demonstrate that it is achieving the highest possible level of safety in its decisions and actions.

Motor Carrier Driver Qualifications Exemption Policy

In light of these events and national concern about safety, Advocates opposes the policy of granting a multitude of exemptions from the federal motor carrier safety regulations (FMCSRs) including the driver qualification standards. Rather than granting numerous individual exemptions, the agency should focus on scientific research that will establish whether current vision standards accurately measure the level of safety required to ensure safe motor carrier operations, and on research to develop a rational basis for conducting individualized testing. Granting exemptions from the FMCSRs based on inadequate surrogate criteria does not ensure that deviations from the motor carrier safety standards will provide equivalent or greater levels of safety. Moreover, piecemeal exemptions from otherwise credible and established standards will only serve to undermine the standard itself and increase the pressure to grant an increasing number and variety of exemptions, including exemptions from other safety standards.[1] Unfortunately, FMCSA and its predecessor agencies have participated in this devaluation of the existing FMCSRs by accepting partial and incomplete research studies, including the flawed data collection from the Vision Waiver Program, as a valid substitute for the vision safety standard, and by placing the burden on the public to oppose granting these and other exemptions.

[1] This pressure to extend the reach of *ad hoc* exemptions, rather than establishing a sound medical and scientific basis for amending the medical qualifications standards in the FMCSRs, is evident from the FMCSA=s promulgation of a similar exemption program for drivers with insulin-treated diabetes mellitus. Notice of Final Disposition, 68 FR 52441 (Sept. 3, 2001). The standard requiring motor carrier drivers to have no loss or impairment of limbs, 49 C.F.R. § 391.41(b)(1), has become another target area for exemption requests despite the fact that the established regulations already includes a waiver program allowing the use of prostheses, *id.,* § 391.49(d)(3)(i)(B). *See* 67 FR 11369 (Mar. 13, 2002). Moreover, the FMCSA has been required to review the application of a driver with monocular vision who is also missing part of his left arm. *Jerry W. Parker v. DOT*, No. 98-4331, 2000 FED App. 0094P (6th Cir.) (agency to "create a functional capacity test consistent with its findings that an individual's driving record is indicative of future performance"). *See* 67 FR 54525, Aug. 22, 2002. On remand, FMCSA denied the application for exemption from the current limb requirements, requiring the applicant to use a properly fitted prosthesis. 68 FR 8794 (Feb. 25, 2003). That disposition in no way lessens the mounting attacks and increased pressure for *ad hoc* exemptions from the medical and physical qualifications standards. The agency approach has abetted attempts to undermine these standards rather than revise them based on medical knowledge and credible scientific research.

Driver Information Used in the Safety Determination

Lack of Safety Analysis

Advocates reviewed the accompanying background information on each of the drivers as reported by FMCSA. The factual information presented on behalf of each applicant is sparse and no specific safety analyses are supplied. The agency has largely responded to prior criticism that exemption notices provided inconsistent information and often presented subjective or selective information in a one-sided attempt to bolster exemption applications. Advocates acknowledges that, for the most part, the information provided in this and recent notices is presented in a more organized and consistent fashion than in past exemption notices.

We note that the FMCSA now tacitly acknowledges that the accuracy of the information regarding each applicant=s driving experience, including total driving years, mileage driven, and type of vehicle driven, has not been independently corroborated by the agency. In the past, this information was stated categorically without indicating the source, permitting the public to infer either that the information had been gathered by the agency from independent, objective sources, or that the agency had verified the validity of the information relied on in making exemption determinations. Recent exemption notices have clarified that the factual information is supplied by the applicant, *i.e.*, it is self-reported information that has not been independently verified.

While these changes are positive and have improved the fairness of the presentation in the exemption notices, more important problems remain including the lack of complete information, reliance on self-reported information, and the omission of in-depth safety analysis to accompany the agency=s safety determinations. The information provided in the notice amounts only to a terse statement of a few highlights on behalf of each applicant without providing any actual safety analysis or careful scrutiny. Essentially, the information only reflects that each applicant has passed the screening stage for exemption criteria and meets the preconditions set by the agency for consideration of the exemption application. The agency presents to the public five items of information on each applicant: 1) the current status of the vision in each eye; 2) the reason one eye does not meet the vision requirement; 3) a statement from the examiner who conducted the applicant=s most recent eye exam; 4) the self-reported number of years and miles the applicant claims to have driven by type of commercial vehicle; and, 5) the results of the review of each applicant's state driving record for the three years immediately prior to the exemption application. The FMCSA presents these bits of information as if they constitute a safety analysis of the applicants= skill and capability as a commercial driver. The few facts and other self-reported information presented to the public are, at best, raw data from which the agency has jumped to pre-determined conclusion that granting an exemption would be appropriate without supplying any qualitative safety analysis.

Self-Reported Driving Experience

For each applicant, the FMCSA notice states the total miles the applicant claims to have driven (either annually or over their lifetime), the number of years the applicant reports having driven commercial vehicles, the type(s) of vehicle driven, and the most recent three-year driving

record. The public, however, is not advised whether the information presented is taken from the driver applications without outside verification, or whether the FMCSA has determined these figures are accurate by other means. In recent exemption notices the agency has stated that it obtains the three-year driving record directly from state authorities. However, with respect to the other information, the agency has changed its presentation to indicate that the information regarding years of driving experience and total miles driven has been Areported@ by the applicants. The unstated implication is that the information has not been verified by the agency. Since the agency does not expressly state what information has been verified, the public is left to reach its own conclusions. It must be assumed that the agency accepts the information provided by the applicants as factually correct without conducting any procedures to validate the self-reported data.

The agency never squarely addresses the issue of the reliability of such self-reported information. Especially when so little information is required for screening applicants, the reliance on mostly self-reported information renders the process extremely suspect. Aside from the three-year official state driving record, and the most recent vision examination, all other information is self-reported. While some or all of this information may be accurate for many applicants, without independent validation the agency is unable to determine what portion of each applicant=s self-reported information is accurate, inaccurate, incomplete or fabricated. Not only is it widely understood in the research community that self-reported data is not entirely reliable, but FMCSA has encountered problems with the accuracy of self-reported information in connection with a number of exemption applications submitted as part of this program.

In two instances,[2] public comment supplied facts that placed in doubt information

[2] In the notice of applications for exemption for docket number FMCSA-2000-7918, the FMCSA represented to the public that applicant #38 had met the 3-year driving experience criterion and repeated what appears to be the applicant=s statement that he Aoperated straight trucks for four years, accumulating 100,000 miles.@ 65 FR 66286, 66290 (Nov. 3, 2000). However, comments filed by the United Parcel Service (UPS) indicated that the applicant had been driving a commercial motor vehicle for only two years and four months at the time he filed his application for exemption. UPS comments dated Dec. 4, 2000, to docket number FMCSA-2000-7918-3. Prior to being employed as a driver, the applicant performed non-driving duties. *Id.*, attached declaration of Richard L. Saucier. According to the UPS comment, the applicant "occasionally worked as a substitute driver@ but his application indicated that he claimed to have been a A>regular *temporary* driver= in 1995.@ UPS comments, p. 2 (emphasis in original). Without concurrent driving experience with an employer other than UPS (and no other was reported on the application), the applicant did not meet the agency criterion of 3 years driving experience immediately prior to the date of application. The agency could have avoided the problem and the misrepresentation to the public had it independently verified the information and investigated the self-reported claims made in the application. On further review, the agency determined that the applicant did not have the requisite 3 year driving experience and denied the exemption application. Notice of Final Disposition, 66 FR 13825, 13826 (Mar. 7, 2001).

In a separate instance, the FMCSA admitted that another applicant did not have the requisite three-year driving experience required to meet the agency criteria for exemption. The agency made a

reported by the applicants. In each case, information called into question the applicants= completion of the three-year commercial driving experience, one of the criteria for granting the exemption. The agency requires applicants to indicate whether they have driven a commercial motor vehicle for three years immediately preceding the date of the application. Evidently, the agency accepts the self-reported response of the applicant at face value. This information, apparently, is not verified by the agency but is nevertheless relied on by the agency in making exemption determinations. Although employment records could verify actual driving experience for the three years immediately prior to the date of the application, the agency does not require applicants to submit such records and, if employment records are provided to the agency, those records are not placed in the record for public review.[3] Thus, the agency accepts applicant statements in fulfillment of this criterion and only public comment by a recent employer will cast doubt of this assumption. That is precisely what occurred in two separate instances.

These situations provide clear evidence that the agency cannot rely on self-reported information to screen applicants for exemption. There almost certainly are other cases in which information provided by the applicants are inaccurate or untrue. In the two cited cases, the agency obtained more accurate information only because of the diligence of an employer who filed a comment with the public docket in one instance, and because of a subsequent conversation with the applicant in the other. These incidents are a concern and, coupled with other cases in which subsequent information has forced the agency to delay granting applications for exemption, raise questions regarding the thoroughness of agency review and investigation of exemption applications. FMCSA must carefully scrutinize applications and, more importantly, independently verify information with employers and others to ensure the accuracy of self-reported information supplied by the applicants.

Apreliminary@ determination to grant that exemption on the basis of information he provided indicating that the applicant had driven commercial motor vehicles for the past 30 years. 65 FR 45817, 45819 (July 25, 2000). The agency notice also stated that the applicant=s Aofficial driving record shows no accidents and no convictions of moving violations in a CMV for the past 3 years.@ *Id.* Subsequently, the agency learned that the applicant had not driven a commercial vehicle during the three-year period immediately prior to his application, a prerequisite for obtaining an exemption. 65 FR 77066 (Dec. 8, 2000). The agency therefore denied the application, overturning its prior Apreliminary@ determination to grant the application. *Id.*. This case further underscores the need for the FMCSA to verify the self-reported information provided by the applicants.

[3] A check of an applicant's recent state driving history only confirms that an applicant held a valid license and whether an applicant received citations or was involved in crashes during the three-year period covered by most state driving records. The state driving record does not actually verify that the applicant was employed and operating a commercial vehicle during any part or all of that time. Ironically, a record of citations or crashes while operating a commercial vehicle supplies indirect evidence of actual experience driving commercial vehicles, whereas a clear record with no documented infractions does not provide any evidence that the applicant operated commercial vehicles in that time frame. Since the agency considers this driving experience to be an essential factor for granting an exemption, direct verification of employment information is warranted.

In response to criticism raised by Advocates in a previous notice, the FMCSA has stated that only the last three years of driving experience is required under the criteria for an exemption. See docket FMCSA-2000-7006, 64 FR 57230, 57232 (Sept. 21, 2000). As a result, only the fact that the applicant has driven a commercial vehicle for the three years prior to the date of the application is actually verified by the agency. As the recent statements of the agency discussed above make clear, the agency does not actually verify whether an applicant has driven during the three years prior to the application. The agency should directly state in the public notice that such information is self-reported and has not been verified by FMCSA. The agency must either verify such information or eliminate reliance on self-reported information in making safety determinations.

Likewise, the FMCSA has also stated that total miles driven is not a critical criterion and is not verified. *Id.* at 57233. Nevertheless, the agency states that the total A[m]ileage is presented as an indication of overall experience with commercial motor vehicles.@ *Id.* The agency is presenting self-reported information that it has not verified in order to persuade the public that its determination to grant an exemption is accurate, and will likely be safe, even though the agency asserts that it does not rely on this information in making its safety determination.

Advocates maintains that the FMCSA=s presentation of, and reliance on, self-reported information regarding years of experience and total mileage driven is inappropriate for two reasons. First, as the agency readily admits, it has not verified the accuracy of the information it accepts as factual and presents to the public. Without independent verification of self-reported information, the agency cannot accept it as reliable for any purpose because it is subject to mistake, exaggeration, and falsehood. Second, although the agency presents the self-reported career mileage driven and years of driving experience submitted by the applicants, the agency only verifies citations and crashes for a three-year period. Because the agency does not verify crash and citation history prior to the three-year driving record immediately preceding the application, there is no way to ascertain whether the self-reported driving experience, even if correctly reported, is an accurate indication that the applicant has a good or a poor driving history. The self-reporting of driving experience alone, when viewed in a vacuum, will always convey a generally good impression since there is no accurate reporting of negative experience, *i.e.,* crashes and citations, for the same period of time and mileage.[4] As an example, a report of ten years and one million miles of driving experience, standing alone, conveys an impression that the applicant has extensive, positive driving experience. That impression could be altered dramatically, however, if the applicant had been involved in a number of crashes and received numerous citations during the first seven years of that experience – seven years of driver history that does not appear on the three-year state driving record reviewed by the FMCSA. Thus, the

[4] Even were applicants requested to submit citation and crash information over their career such voluntary, self-reported information would not be reliable unless independently verified.

FMCSA=s reliance and presentation of such one-sided, self-reported information Ato give an overall indication of experience,@ *id.*, is entirely inappropriate and prejudicial in making safety determinations because it may provide an incomplete picture of the applicant=s driving history, and because it is irrelevant since, according to the agency's own reasoning, only the most recent three year driving record Ais the critical focus relative to safe driving.@ *Id.*

Advocates continues to maintain that the juxtaposition of presenting large total number of years of self-reported driving experience (*e.g.,*10, 20, and 30 years), as well as a large total number of self-reported miles driven, alongside only the three-year verified driving history creates the misleading impression that applicants with long driving careers also have long safe driving histories when, in fact, this may not be the case in some instances. The clear and possibly misleading implication to be drawn from this presentation is that each applicant had a safe driving record with no crashes (or Aat fault@ accidents), citations, or convictions prior to the last three years. The FMCSA has denied any intention of trying to convey such an interpretation. *Id.* However, the repeated presentation of the driving history information in this manner, regardless of the agency=s intent, leaves the impression that each applicant has a record of experience prior to the last three years that is unblemished by collisions or citations since those negative aspects are not reported. An impression the agency readily accepts as an indication of overall experience with commercial motor vehicles. The agency has made no statement nor taken any action to deter the public from drawing such an unfounded conclusion.

The agency cannot have it both ways. Either the prior driving history is part of the safety determination since it presents an indication of the applicant=s overall experience, in which case the agency must independently verify the self-reported information and provide comparable accident and citation histories to provide a fair and accurate summary of the experience, or the driving experience prior to the last three years is irrelevant and should not be considered by the agency in its decision making process for any purpose and should also not be presented to the public in agency notices.

Moreover, recent experience with state submission of documented accidents and citations that pre-date the three year driving record raise serious concerns about the factual record on which the FMCSA relies in making its determinations to grant vision exemptions. First, the FMCSA should avail itself of state collected driving information including state records older than three-years. So long as driving records are verified as accurate by the state they are relevant and material to the safety determination. In reviewing exemption petitions, the agency should avail itself of all information that is germane to the driving record and safety of the applicants. The FMCSA should request driving histories over extended time intervals from states that retain driving records for more than three years, even if that requires states to search additional databases and archived files. At the very least, this would afford both the agency and the public a more complete and realistic basis for evaluating the information that the agency has stated provides an overall indication of experience.[5] Second, the agency should not publish as fact self-

[5] Advocates realizes, however, that the FMCSA is reluctant, if not unwilling, to deny an

reported information about driving records without authenticating accident and citation information. The agency should consider reporting only driving experience and mileage history for which the agency has obtained a state driving record or has in fact verified the driving history of the applicant. Advocates believes that the FMCSA should make every effort to assure the public that exemptions are only granted to those drivers with a verified safe driving history of at least five to ten years, not just the most recent three-year period.[6]

The self-reported figure of the total miles driven by each applicant is either stated as a single total for the applicant=s entire driving career, or as an annual figure which is intended to be multiplied by the number of years of self-reported driving experience claimed by the applicant. As a result, the FMCSA provides no reliable driving (mileage) exposure data for the last three years covered by the official driving record of each applicant. (Unless it is claimed that the applicants actually drove an equal number of miles each and every year). The agency has dismissed the need for annual exposure data in stating that whether an applicant accumulated accidents and citations under low or high mileage exposure during the critical three year period is Anot relevant to the determination of the driver=s acceptability.@ 65 FR 57233. Advocates disagrees.

FMCSA has adopted a strict number of Aat-fault@ crashes or citations that must appear on the applicant=s record in the last three years as its bright line for the safety determination. Advocates believes that, based on information published in the record, the agency should consider a sliding scale standard for drivers with comparatively little driving experience. Advocates has observed that while many applicants self-report extensive experience, a number of applicants report only three or four years driving experience with a limited number of miles

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exemption based on prior driving records submitted by state officials. For example, the California Department of Motor Vehicles submitted to the agency verified evidence that one applicant had been cited for driving on the wrong side of the road in 1995, five years prior to his exemption application, and also had been found to be the party most responsible for two crashes in 1995 and 1996, which occurred five years and four years, respectively, prior to his exemption application. 65 FR 57232. Although the agency did not deny or rebut these facts it treated them as ancient history and, in granting the exemption, actually cited the applicants= past accident history as a positive sign that the applicants had improved their safety record during the three years immediately preceding the exemption application. *Id*. The fact that such an analysis runs directly counter to the agency=s working premise, that past record is a good predictor of future safety, is not mentioned in the agency's effort to rationalize all relevant information, no matter how negative, in a manner that bolsters the agency=s predetermined intent to grant such applications.

[6] Advocates does not concur with the FMCSA=s view that requiring some drivers to submit three year records and other drivers to submit longer records is necessarily arbitrary and capricious. 65 FR 57233. Where state laws vary, and certain states maintain records for longer periods of time, the agency can rely on those laws and official records. Regardless, the agency should assist all states in maintaining these critical safety records for periods of at least five and up to ten years.

driven. For applicants reporting relatively low accumulations of mileage and years of experience, but who nevertheless have accidents or citations on their record, exposure should be a factor in making the safety determination. Applicants with less accumulated experience should not be accorded the same degree of driving competence as applicants with longer experience. We base this view on two factors. First, exposure, rather than a predetermined number of accidents or citations, is frequently used as an appropriate means of determining safety. In this regard we point out that in other contexts the FMCSA often relies on the fatality rate, rather than on the total number of annual fatalities, as an accurate measure of safety progress in truck-related crashes. Second, the agency has consistently stated that drivers with substandard vision in one eye can adjust over a period of time and, presumably, driving experience. Thus, the agency continually relates the age at which an applicant=s impairment occurred implying that the earlier in life it occurred the more time the applicant has had to adjust. It is not, therefore, unreasonable to expect that applicants with limited time and travel exposure may not be qualified for an exemption or should be disqualified at a lower level of accidents or citations. However, in making the safety determination for an exemption based on inadequate vision, the agency fails to take into account either the driving experience (in terms of years of driving and distance driven in commercial vehicles) or the short time period available for adjustment of vision during driving for applicants who incurred an eye impairment relatively recently, within a few years of submitting their exemption request. FMCSA provides no objective analysis or scientific research regarding the minimum time or driving experience that is necessary to ensure that a commercial driver has adapted to driving with poor binocular vision or, indeed, with only monocular vision. In light of these considerations, the agency should set a minimum mileage limit in commercial vehicles, as well as a minimum time limit from the date of the onset of the vision impairment, below which an applicant cannot obtain an exemption, and a descending scale based on exposure for accident and citation accumulation.[7]

FMCSA has argued that A[d]efining a required minimum mileage for application would enact a spurious screening standard.@ 65 FR 57233. Nevertheless, the agency clearly believes that the number of miles driven has value as a measure of safety. AIt is part of the basis for establishing whether a program has achieved >a level of safety that is equivalent to, or greater than, the level of safety that would have been achieved= absent the exemption.@ *Id.* This, however, is precisely the determination the agency is required to make for each exemption application. Thus, it is no small coincidence that the agency publishes the self-reported total mileage for all applicants and considers total mileage to Agive an overall indication of experience.@ *Id.* For this very reason, the agency should require applicants to meet a minimum total or average annual mileage, at least for the prior three years, as one of the qualifying

[7] FMCSA should be required to verify self-reports of driving mileage and years of experience. Not only should FMCSA attempt to ascertain mileage driven for the last three years, the pertinent period for which the agency checks state driving records, but the agency should also evaluate whether the criteria used in the exemption program is applicable for predicting future safety records based on low cumulative mileage totals over that three year period.

criterion for an exemption, just as it requires a minimum of three years driving experience. In this regard, the self-reported mileage driven by applicants in the present notice varies widely, from as little as 22,000 total miles over 3 years of driving experience for applicant #23, 68 FR 52814, to reported totals exceeding 4 million miles of driving (self-reported) over careers spanning 35 and 42 years of experience for applicants #22 (*id.* at 52813-14), and #25 (*id.*at 52814), respectively. Despite meeting the agency requirements for exemption, a number of applicants reported total career miles driven that, given the reported years of driving experience, yield relatively low annual averages of miles driven. By contrast, other applicants have reported over a million total miles of driving indicating, when divided by their reported years of driving, much higher comparative average total annual mileage. The relative exposure of these drivers, even if actual driving conditions were similar, is quite distinct.[8]

Other Conditions Affecting Safety

Advocates has also argued that the FMCSA has made no effort to scrutinize the conditions under which the applicants have obtained their self-reported driving experience. There is no analysis of the percentage of total miles driven daytime versus nighttime, intrastate versus interstate, or long haul versus short haul. Further, the FMCSA has not made any attempt to identify differences in the driving experience of the applicants based on the type of driving routine and vehicles driven. In response, the FMCSA dismisses the conditions under which applicants obtained their driving experience as irrelevant.[9] Nevertheless, the agency now provides a break down of applicant driving history by certain types of vehicles -- straight truck, combination, and bus -- where such self-reported information is available, it has not attempted any analysis of whether one type of experience has greater predictive value for safety than another.[10] The agency simply dismisses the need for further analysis by stating that it Ahas not

[8] Comparison of selected applicant self-reported information:

APPLICANT	YEARS DRIVING	TOTAL MILES	ANNUAL AVERAGE
23	3	22,000	7,333
9	28	280,000	10,000
16	30	750,000	25,000
8	19	1,225,000	64,474
25	42	5,050,000	120,238

[9] Although not included in the hours-of-service final rule, 68 FR 22456 (Apr. 28, 2003), in the proposed rule the FMCSA distinguished between five types of drivers and driving regimes based on the type of vehicle driven and work performed: long haul; regional; local-split shift; local; and work vehicle. Notice of Proposed Rulemaking, 65 FR 25540 *et seq.* (May 2, 2000).

[10] FMCSA gives no insight as to how it evaluates, compares and contrasts driving experiences based on operating different types of commercial equipment under distinct driving conditions in which the applicants obtained their experience. In the current notice, for example, a number of applicants reported accumulating all their driving experience in either straight trucks or tractor-trailers alone, while other applicants reportedly drove both types of CMVs to varying degrees. Applicant #17 reportedly drove straight trucks exclusively for 17 years, accumulating 340,000 vehicle miles, an annual average of

assessed the relative value in terms of driving experience between driving these [] types of vehicle configurations.@ 65 FR 57233.[11] This, and other failures to provide safety analyses based on specific driving experience and conditions, indicates that the exemption process is not based on a credible, scientific evaluation of individual driving experience but is instead a broad-brush uncritical enterprise aimed at awarding as many exemptions as possible.

Moreover, FMCSA fails to engage in any analysis or comparison of intrastate and interstate operating conditions. Presumably, the applicants have obtained all of their self-reported driving experience and mileage while operating intrastate as a result of their visual impairment. Since the applicants have no experience in interstate commercial operations, the agency must address how change in operating conditions and environment will affect the safety of drivers who will be allowed to engage in long-haul, overnight interstate movements and operations should the agency grant the application for exemption. However, the agency presents no such safety analysis.

FMCSA also continues to emphasize that most exemption applicants do not have an accident or citation (however, only in a commercial vehicle) in the prior three years. In this notice the agency reports that 8 of the 30 applicants have a crash or a citation on their driving records within the last three years. In past notices, the agency has made representations that characterize the facts relating to applicant crashes and violations in an effort to down-play the seriousness of the incident. That effort is repeated in this notice regarding the facts of the crashes reported on applicant driving records. Unless the agency places the legal documents pertinent to each situation in the docket for public review, the agency should refrain from engaging in the unilateral defense of an applicant based on information that is not part of the public record. It is inappropriate and prejudicial for FMCSA to proffer the applicant=s version of events, or to provide selective information from documents not in the public record of the

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20,000 miles. 68 FR 52813. Applicant #22, by contrast, reported accumulating 4.2 million vehicle miles in 35 years, for an average of 120,000 miles per year, nearly six times the average annual driving total reported by applicant #17, but exclusively in tractor-trailer combinations. *Id.* at 52813-14. Also compare applicant #12, who reportedly drove 3.1 million vehicle miles in tractor-trailer combinations in 37 years, and 210,000 vehicle miles in straight trucks over a 3 year period, *id*. at 52813, with applicant #26 who reported driving straight trucks and tractor-trailer combinations for equal 15 year periods and accumulating identical totals of 375,000 miles in each type of vehicle. *Id.* at 37198. In addition, applicant #16 reported driving buses for 3 years and 15,000 miles, *id.,* at 37199, while applicant #33 reported driving buses for only 1 year but accumulating 57,000 miles, i*d.* at 37201. FMCSA treats all these reported driving experiences as equal, or at least does not differentiate between types of vehicles driven, total miles claimed to have been accumulated, and length of service and operating experience.

[11] Yet the FMCSA has distinguished differences in operations and crash experience between motor coaches and freight trucks by not including motor coach operations in the scope of the hours-of-service final rule that permits freight motor carrier operators to drive for as many as 77 hours in a 7 day period and up to 88 hours in an 8 day period. 68 FR 22456, 22462 (Apr. 28, 2003).

agency regulatory proceeding, in an effort to support the application and bolster the basis for the agency=s safety determination.[12]

Advocates also notes that 4 of the applicants described in this notice do not hold a commercial drivers' license (CDL) form their home state. In each case, the applicant holds a state issued driver's or chauffeurs license that may permit the operation of medium and heavy vehicles but does not possess a CDL as required by federal law and regulation. FMCSA does not discuss the safety implications of granting exemptions to persons who do not meet the vision standard and who do not have a CDL.

Vision Compensation

The FMCSA has asserted that over time, and with experience, drivers "adapt" to their visual deficiencies. The agency has not specified any precise amount of time, conditions, or factors that are involved in such adaptation, but techniques such as head nodding have been mentioned as behaviors that allow drivers to compensate for the loss of visual acuity, binocular vision, depth of field, and full peripheral vision. Such behavior modification is dependent on unspecified changes in driver behavior over an unknown period of time that will vary from individual to individual. The agency has provided no data or analysis of this process. The agency has made it clear that it is not concerned about the visual capacity of applicants who were either born with a vision deficiency or have had the deficiency since childhood . *See, e.g.,* 68 FR 19596. However, even assuming that over long time intervals that sufficient adaptation occurs to permit the safe driving of commercial vehicles, the agency cites no minimum time period from the loss of visual capacity, nor any minimum time period of driving experience, that would ensure such adaptation. In this notice, 2 applicants suffered relatively recent vision loss. Applicant #13 lost his right eye due to an injury 4 years ago, in 1999. 68 FR 52813. Applicant #22 has had macular degeneration in the left eye since 1998. *Id.* These applicants have had their visual deficiencies for 5 years or less. Despite the fact that the agency is providing a case-by-case analysis of the safety record for each applicant, the agency does not discuss whether each of these individuals, or the other applicants, have fully adapted to their visual deficiency. Since these are comparatively recent events, the agency is obligated to address the issue of whether and how the applicants have actually compensated for their loss of visual acuity. Data on driving experience since the onset of the visual impairment, even self-reported information, has not been provided in the record. In the past, the agency has concluded that applicants with an acceptable number of at-fault accidents or violations in the previous three years "demonstrat[e] the likelihood that they have adapted their driving skills to accommodate their condition," 68 FR

[12] While the FMCSA has tempered its past efforts to defend the crash records of exemption applicants, the agency returned to that practice in recent notices. Not only does the agency=s reliance on facts and information that are not part of the record constitute a violation of procedural due process, but the agency can provide no absolute assurance that, despite lack of a legal finding of Afault,@ the driver=s substandard vision was not a factor in the causation of the crash. FMCSA should foreswear this tactic in future exemption notices.

19597. This conclusion is not supported by any safety analysis or research.

Statements of Ophthalmologists and Optometrists

Advocates continues to advance its objection with regard to the FMCSA=s reliance on personal statements from ophthalmologists or optometrists as to the applicant=s ability to safely operate a commercial motor vehicle. While these specialists may be able to provide information regarding visual capabilities and pathology of the applicant, they are not experts on the driving task and are probably unfamiliar with the requirements for safe operation of commercial motor vehicles. They also are not the health care providers charged with overall commercial driver medical certification. This is particularly true in light of the fact that the vision standard requires better vision than any of the applicants possess and better vision than required by most states for passenger vehicle operation licensure. Moreover, none of these statements indicates that the ophthalmologists or optometrists quoted in the applicant information are familiar with the basis for the current federal vision standard, the types of vehicles that are driven by the applicants, the conditions under which their patients actually operate a commercial vehicle including annual driving mileage, amount of time spent loading vehicles and waiting for loads, amount of nighttime driving performed, weather conditions, over-the-road sleeping conditions (sleeper berths, motels), etc.[13] These conditions are addressed in the statements provided for the record.

Further, the ophthalmologists or optometrists conducting the exams often have no prior familiarity with the patient. While such professionals can attest to a patient=s level of visual acuity, they cannot be relied on for the proposition that the applicant has sufficient vision to perform the task of operating a commercial motor vehicle. These professionals have no experience and professional training in commercial vehicle operations on which to properly base a conclusion regarding the applicant=s driving ability. Beyond stating that the applicants they have examined possess a certain level of vision in one or both eyes, and have the requisite medical certificate, the statements of the applicant=s qualifications to safely drive a CMV are immaterial. This is a further example that not only do vision examiners often include extraneous and irrelevant statements in their exam report, but that they may also base their own conclusions of vision capability of the driver on subjective information other than the actual eye examination.[14] The agency,

[13] In past notices, eye examiners have explicitly stated the limitations of their examination. In one case, an opthalmologist frankly stated that "I am not familiar with the criteria of vision requirements of a commercial driver . . . ," 68 FR 19599 Apr. 21, 2003), but nevertheless concludes that the applicant should continue to operate commercial vehicles. In another instance, after stating that the normal visual function of the left eye of the applicant "should supply him with sufficient vision to perform driving tasks[,]" the doctor goes on to state, "[h]owever, this only qualifies his visual potential *and not overall competency to perform the tasks of operating a commercial vehicle."* 67 FR 15662, 15665 (Apr. 2, 2002) (emphasis added) (applicant #24). The agency should acknowledge this limitation applies to all the quoted statements of the eye examiners for each exemption application.

[14] In one example, an optometrist concluded that the applicant had sufficient vision to drive commercial vehicles basing his expert opinion of the applicant's visual capability on the applicant's self-report of his good "past driving record." 67 FR 76439, 76440 (Dec. 12, 2002) (applicant #6). Even more

however, uses the statements of the ophthalmologists and optometrists not just to establish the degree of the applicant=s visual acuity, but as testimonials to support the overall inference that the applicant is a safe driver. While the doctors are experts on vision, they are not experts on driving ability and motor carrier operations, and so their opinions on those issues are not persuasive, should not be relied on by the agency, and should not be quoted and recited as fact in the agency=s public notice.

Misplaced Reliance on the Vision Waiver Program

The FMCSA=s Notice of Petitions and Intent to Grant Applications for Exemption, in concluding that the applicants= petitions for exemptions should be granted, relies in part on the results obtained from the ill-conceived and illegally promulgated vision waiver program. In past notices the agency has repeatedly asserted that A[t]he [] applicants have qualifications similar to those possessed by the drivers in the waiver program.@ 65 FR 45824. The agency has also asserted that A[w]e believe that we can properly apply the principle to monocular drivers because the data from the vision waiver program clearly demonstrate the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively.@ *Id.* Advocates rejects this use of information collected from the now-defunct vision waiver program. We also disagree with the agency=s oft-stated conclusion A*that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely*.@ *Id.* (emphasis added). No such conclusion is tenable since the vision waiver program did not use a valid research model nor did it produce results that could legitimately be applied to drivers other than participants in the original vision waiver program.

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ludicrous, the same optometrist cited the applicant's prior "good vision *when using both eyes*," a factual condition that had not existed for four (4) decades because the injury that damaged the macular area of the applicant's right eye took place 40 years prior to the examination. *Id.* (emphasis added).

In another notice, the examining optometrist for an applicant cited the drivers' "past 29 years with a reportedly clean driving record." 68 FR 37197, 37198 (June 23, 2003) (applicant #8). Yet the FMCSA indicated that the applicant only reported driving commercial vehicles for the last 9 years. *Id.* The dichotomy in the information was left unexplained.

Indeed, FMCSA was strongly criticized by a number of independent researchers and research organizations for ignoring basic principles of scientific methodology in its conduct of the vision waiver program. In the wake of the federal court decision that invalidated the vision waiver program, *Advocates for Highway and Auto Safety v. Federal Highway Administration*, 28 F. 3d 1288 (D.C. Cir. 1994), the agency admitted the inadequacy of the study methodology and design. AThe FHWA [now FMCSA] recognizes that there were weaknesses in the waiver study design and believes that the waiver study has not produced, by itself, sufficient evidence upon which to develop new vision and diabetes standards.@ 61 Fed. Reg. 13338, 13340 (Mar. 26, 1996).[15] The agency cannot have it both ways B it cannot claim an invalidated and incomplete waiver program as a source for scientifically credible principles for application to the current exemption process.

Most importantly, it is potentially improper and anomalous for the agency to attempt to apply facile generalizations about monocular driver capabilities to a case-by-case evaluation of each exemption applicant. This attempt contradicts the basic premise of the exemption evaluation and of reviewing each applicant=s case virtually *sui generis* and on the unique merits of the facts and circumstances which may qualify or disqualify any given applicant. In fact, the information collected in the vision waiver program is worthless as scientific data, and conclusions regarding the safety of any other individual driver or group of drivers who did not participate in the vision waiver program are neither credible nor scientifically valid. The agency cannot extrapolate from the experience of drivers in the vision waiver program to other vision impaired drivers who did not participate in that program. This point was made repeatedly to the FHWA in comments to the numerous dockets spawned by the agency=s determination to grant vision waivers. It was made quite clear at the time the agency undertook to grant waivers to drivers in the vision waiver program that the individualized information accumulated in that program could not be used to serve any other purpose. Information collected in that program has been comprehensively repudiated as a basis for drawing any conclusions about non-participant drivers. The FMCSA, therefore, is obligated to re-evaluate the merits, and reconsider its preliminary determination to grant exemption petitions without any reliance on, or reference to, the experience of the drivers who participated in the vision waiver program.

Moreover, the agency asserts that drivers who do not meet the existing vision standard requirements can Aadapt to their vision deficiency and operate safely.@ *Id.* Yet the FMCSA provides no basis on which to assert that drivers in the original Vision Waiver Program adapted to their vision deficiency or how this was accomplished. More important to the current circumstance, however, is the fact that no evidence of such adaption is presented by or on behalf

[15] *See also* Qualification of Drivers; Vision Deficiencies; Waivers -- Notice of Final Determination and change in research plan, 59 Fed. Reg. 59386, 59389 (Nov. 17, 1994) (AThe agency believes that the observations made by the Advocates, the ATA, the IIHS and others regarding flaws in the current research method have merit@).

any applicant for exemption. Proof of this adaptive practice or behavior is crucial to the agency=s argument and safety determination, yet none is presented.

The Legal Standard for Exemptions

Burden of Proof

The Secretary of Transportation must meet a very exacting legal standard in order to grant an exemption to the FMCSRs. The statute requires the Secretary, prior to issuing an exemption, to determine that the exemption is "likely to achieve a level of safety that is equivalent to, or greater than, the level [of safety] that would be achieved absent such exemption.@ 49 U.S.C. ' 31315(a).[16] The statute not only expressly states the standard to be achieved B equal or greater safety B but also imposes the burden of proof that the Secretary must meet in making safety determinations to grant exemptions.

The statute limits the authority of the Secretary to grant exemptions only to those that are Alikely@ to result in a safety outcome that is at least equal to the level of safety that existed before the exemption was issued. The use of the word Alikely@ means that the result must be probable.[17] This is a high legal standard of proof, comparable to the requirement that parties seeking a preliminary injunction must establish a Alikelihood@ of success on the merits.[18] More than a mere preponderance of the evidence in the record must support the proposition that granting the exemption will yield equal or greater levels of highway safety. While the evidence need not be unanimous, an overwhelming majority of the evidence must unequivocally support the proposition that a particular exemption will, in all probability, result in equal or greater safety. Thus, the Secretary does not have discretion to issue exemptions when the evidence is unclear, evenly divided, or fails to establish that an equal or greater safety result is probable.

Advocates is convinced that the FMCSA has not met its burden of proof based on the administrative record before the agency. While there is a mix of scientific data and research and other information in the record, the agency cannot assert that the evidence proves that ITDM exemptions will probably result in an equivalent or greater level of highway safety. Objective evaluation of the scientific evidence reveals that the claims made by the agency regarding the

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[16] Originally enacted as Section 4007 of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-78, 112 Stat. 107 (1998).

[17] A1. Possessing or displaying the qualities or characteristics that make something probable.@ American Heritage Dictionary of the English Language, 3rd ed. (1992); A1. probably or apparently destined . . . 2. Seeming like truth, fact, or certainty; reasonable to be believed or expected[,]@ Random House Dictionary of the English Language, Unabridged Edition (1971).

[18] *See* likelihood-of-success-on-the-merits test, Black=s Law Dictionary, 7th ed. (1999) (AThe rule that a litigant who seeks a preliminary injunction, or seeks to forestall the effects of a judgment during appeal, must show a reasonable probability of success in the litigation or appeal@).

safety of ITDM drivers is not supported by the research and that the research findings are not nearly as clear and unequivocal with respect to the safety result as the agency has asserted. While there may be some evidence in the record to support the agency view, the majority of the evidence does not support the conclusion that granting numerous exemptions to individuals with ITDM to drive in interstate commerce will probably result in equivalent or greater levels of safety than would exist if the program were not established. On this record, therefore, the evidence does not indicate that ITDM exemptions are Alikely@ to result in equal or greater highway safety and, therefore, a program to grant such exemptions should not be adopted.

The Legal Standard For Issuance of Exemptions Is Not More Flexible Than the Former Legal Standard that Governed the Issuance of Waivers

As already noted, the statutory language requiring a safety result that is equivalent to, or greater than, the previously existing level of safety, sets an extremely high safety standard. This standard is no less stringent than the former statutory standard that required waivers to be consistent with safety. FMCSA has, nevertheless, asserted that the current statutory language permitting the issuance of exemptions affords the agency Agreater flexibility and discretion to deal with exemptions than the previous standard.@ 66 FR 39551 (citation omitted). The present legal standard, however, is not a lower or more flexible standard than the previous statutory requirement that waivers must be "consistent with . . . the safe operation of commercial motor vehicles."[19] The express wording of the current statute requires that highway safety be maintained at the level of safety that existed prior to the granting of the exemption. Any attempt to gloss this standard as a less demanding or more flexible safety standard than the preceding statutory standard is a misinterpretation of the unambiguously clear statutory language.

Not only is the legal standard for granting exemptions not less stringent, the opposite is actually the case. A comparison of the wording of the two provisions reveals that the current exemption provision actually imposes a stricter standard than was included in the prior waiver provision. The standard for granting exemptions is more stringent in two ways. First, the prior waiver provision language only required a result that was Aconsistent@ with the public interest and Athe safe operation@ of commercial motor vehicles.[20] That language did not necessarily require an outcome resulting in equivalent or greater safety. The terminology of the previous waiver provision was undefined in the statute and could have been interpreted to mean that something less than an equivalent level of safety would have been acceptable.[21] It is evident that the intended result required by the current statute, equivalent or greater safety, imposes the same

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[19] *Compare* 49 U.S.C. ' 31315(a) ("is likely to achieve a level of safety that is equivalent to or greater than, the level of safety that would have been achieved"), *with* 49 U.S.C. ' 31136(e) ("consistent with the public interest and the safe operation of commercial motor vehicles").

[20] 49 U.S.C. ' 31136(e) (1992). The waiver provision was originally codified at 49 U.S.C. App. ' 2505(f), and was redesignated as 49 U.S.C. ' 31136(e) in the 1994 recodification of title 49.

[21] In fact, the appellate court that decided *Advocates for Highway and Auto Safety* v. *Federal*

if not an even higher level of safety than the prior requirement which only limited waivers to those that were Aconsistent@ with the safe operation of commercial vehicles.

Second, the prior statutory provision did not establish any legal standard of proof on which to base the safety determination to issue a waiver. Arguably, as long as there was some minimum factual support in the record on which to base the issuance of a waiver, and which established a reasonable basis for agency action, the waiver could have been issued.[22] The Court

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Highway Administration, 28 F.3d 1288 (1994), did not interpret the legal standard for waivers as imposing an absolute standard that safety could not be reduced by issuance of a waiver. Rather, the Court accepted the agency=s view that waivers could only be issued if Athere will >not be any diminution of safety resulting from the waiver=.@ *Id.* at 1294. This statement of the applicable standard was the agency=s formulation and is identical (in effect if not terminology) to the present standard for granting exemptions. Thus, the newer exemption standard B requiring Aequivalent to or greater@ level of safety B imposes at least the same legal burden (if not a higher one) than the prior standard for waivers. As a consequence, the exemption standard cannot be considered more flexible or as providing greater discretion than the standard that applied to the issuance of waivers.

The issue in *Advocates* did not, however, revolve around the stringency of the legal standard. The Court=s actual ruling was that the agency had no evidence to support issuing waivers and that, in reality, the record was Adevoid of empirical support in the record.@ *Id.* It was not the case that the legal standard was too high, but rather that the agency had no factual evidence of any kind. Thus, the waiver program before the Court would not have passed muster under any legal standard.

[22] Advocates disagrees with the stance adopted first by FHWA, and now FMCSA, that the waiver provision imposed an absolute safety standard that the agency could never meet. The waiver statute limited authority to issue waivers only to those waivers that were in the public interest and consistent with the safe operation of commercial vehicles. Even if this standard required that waivers could not result in lower levels of highway safety, then it is no different from the standard in the present exemption statute. The wording of the current exemption statute, by requiring exemptions to result in equivalent or greater safety, impose the same standard. The major difference then, between the two statutes is that the waiver provision required no specific burden of proof or legal quantity of factual evidence to support the determination to issue a waiver. Under the terms of the waiver provision the agency could support its determination, as any other regulatory decision, so long as it had some evidence in the record to indicate that the issuance of a waiver would not diminish safety. By contrast, the current exemption provision now imposes a distinctly greater burden of proof on the agency before an exemption can issue. The agency cannot now simply rely on some evidence in the record to support its determination the an exemption will result in equivalent or greater levels of highway safety; the agency must now show that it is likely, *i.e.*, probable, that the result will be an equivalent or greater level of safety. Thus, while the agency has the same ultimate goal, *viz.,* no less safety, it must now satisfy a higher legal burden of proof.

To the extent that the FMCSA believes that the use of the term Alikely@ in the statute indicates that the current legal standard for granting exemptions provide more flexibility and discretion than the previous standard for issuing waivers, Advocates disagrees. It appears that FMCSA reads the term Alikely@ to permit some Awiggle room@ in making its determinations as to whether the safety outcome will result in equivalent or greater safety. As previously stated, the use of the term Alikely@ actually increases the legal and factual burden on the agency without in any way reducing the ultimate requirement to ensure that exemptions will not diminish highway safety.

in *Advocates* found that there was no evidence to support the agency waiver program. Under such a standard, the administrative record on which the proposed diabetic waiver program rests might have been sufficient for the adoption of the program and the issuance of ITDM exemptions. But the current statute requires enough evidence in the record to establish that the issuance of an exemption will Alikely@ result in equal or greater safety. As previously shown, this demands that the record establish that the outcome of equal or greater safety is probable, not just possible. This imposes a burden of proof not found in the prior waiver provision. Far from reducing the legal burden on the Secretary, or making the issuance of exemptions under current law either more flexible or less stringent than was applicable for the issuance of waivers, requiring that equivalent or greater safety be the Alikely@ result actually raises the evidentiary bar for the issuance of exemptions as compared to waivers.

Thus, not only does the wording of the statute prevent any interpretation that the exemption requirement is more lax than the waiver provision, but the addition of an evidentiary standard requiring a high level of proof in the record contradicts the agency=s position that exemptions are subject to a lesser legal or evidentiary standard than was required to issue waivers.

The Legislative History Does Not Support the Agency=s Position

The FMCSA has asserted, nevertheless, that the legislative history of the exemptions provision indicates that the Secretary has greater leeway to grant exemptions. The agency relies on selective portions of the legislative history of the current provision, citing H.R. Conf. Rep. No. 550, 105th Cong., 2d Sess., at 489 (1998). 66 FR 39551. This contention asserts that Congress sought to overturn the Court of Appeals decision in *Advocates,* which the agency has argued limited the ability of the Secretary to issue waivers. *See* agency discussion in FMCSR Technical Amendments Final Rule, 65 FR 25285, 25286, May 1, 2000 (FMCSA); FMCSR, Waivers, Exemptions, and Pilot Programs, Rules and Procedures, Interim Final Ruel,63 FR 67600, 67601, Dec. 8, 1998 (FHWA). According to this history in order "[t]o deal with the [Court's] decision, this section substitutes the term 'equivalent' to describe a reasonable expectation that safety will not be compromised." H.R. Conf. Rep. No. 550, at 489-90.[23] The agency cannot, however, rely on this statement to support its position of a lower legal standard for exemptions for two reasons.

[23] In fact, the legislative history contained in H.R. Conf. Rep. No. 550 does not indicate any Congressional intent to permit the agency to accept less safety as a consequence of waivers or exemptions than was permitted through the application of a "consistent with safety" determination that was required for waivers. Moreover, any diminution of safety, such as through an increase in crashes and/or crash severity, clearly would violate the plain meaning of the current statutory text which requires that any and all awarded waivers and exemptions be likely to result in motor carrier operations which generate "equivalent or greater safety."

First, any reading of this legislative history to indicate a weakening of the legal burden and an attempt to override the Court of Appeals decision in *Advocates* must be squared with the express wording and meaning of the statutory language as enacted. The exemption statute expressly states that the Secretary may grant exemptions if they are Alikely@ to result in equivalent or greater safety; there is no implication that less safety or safety flexibility is intended. The term 'equivalent' means "equal, as in value, force, or meaning"[24] and is "corresponding or virtually identical esp. in effect or function.@[25] Nothing whatever in the use of the word 'equivalent' as a substitute for the expression 'consistent with,' used in the prior statutory provision, connotes or implies any increased flexibility, diminution, or other abridgement of the enacted safety standard for granting and administering exemptions. Moreover, even according to the cited legislative history, the term 'equivalent' was selected by Congress not to undermine safety or to relax a strict interpretation of the prior legal standard. The legislative history actually supports the view that Congress intended exactly the contrary purpose, viz., to provide "a reasonable expectation that *safety will not be compromised*." *Id.* (Emphasis supplied).

Second, the cited legislative history is actually taken from the Senate amendment to the original House bill. The statement referring to the decision in *Advocates* was not restated or reiterated in the Conference Report substitute that supplanted the Senate version. *Id.* It is the Conference Report substitute, not the prior Senate amendment gloss that was replaced by the Conference Report language, that represents the controlling legislative history accompanying the law. Indeed, the Conference Report substitute, while stating that it includes basic provisions of both the House and Senate versions, makes no mention of the cited court case nor does it intimate that any increased discretion provided to the Secretary for granting exemptions.[26] The views expressed in the Senate report are not explicitly adopted or restated in the Conference substitute. As a result, there is little value in the Senate Report statements regarding the decision in *Advocates.* Even so, and as discussed above, statements in legislative history are fundamentally worthless to the extent that they openly conflict with the clear intent of Congress expressly stated in the statute. In this instance, the strained interpretation relied upon by FMCSA is directly countermanded by the express wording of the statute.

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[24] American Heritage Dictionary of the English Language, 3rd ed. (1992).

[25] Webster=s New Collegiate Dictionary 10th ed. (1997).

[26] In fact, the rigorous controls included in the exemption portion of section 31315 are a paradigm shift in the level of procedural adequacy required to be observed by FMCSA in reviewing the granting of exemptions. In light of the fact that Congress was aware that additional controls on the authority to grant exemptions were part of the legislation, and that the goal of the exemption process was to only grant exemptions that would achieve equivalent or greater safety, it cannot be argued that the current provision provided the agency more flexibility or directly overturned the decision in *Advocates.* That is most likely the reason that the language in the Senate Report was not included in the Conference Report substitute.

Supreme Court Decision on Vision Waivers

In *Albertsons, Inc. v. Kirkingburg,* No. 98-591 (June 23, 1999), the U.S. Supreme Court specifically rejected vision waivers[27] as a regulatory modification of the vision standard in the Federal Motor Carrier Safety Regulations (FMCSRs). A[W]e think it was error to read the regulations establishing the waiver program as modifying the content of the basic visual acuity standard. . . .@ *Albertsons, slip op.* at 15. The Court refuted the view that Athe regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation, as if the general rule [vision standard] had been modified by some different safety standard made applicable by grant of a waiver.@ *Id.* The Court reached this opinion based on the FHWA=s own assertion that it had no facts on which to base a revised visual acuity standard either before *or after* the vision waiver program. AThe FHWA in fact made it clear that it had no evidentiary basis for concluding that the pre-existing standards could be lowered consistently with public safety.@ *Id.* at 19. According to the Court, Athere was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter.@ *Id.*

In making these statements and reaching its conclusion, the Supreme Court relied heavily on the administrative record compiled and the decision of the Court of Appeals rendered in *Advocates for Highway Safety v. FHWA,* 28 F.3d 1288 (CADC 1994). The Supreme Court summed up the agency=s basis for the Vision Waiver Program as follows:

> [T]he regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way. The waiver program *was simply an experiment with safety,* however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards.

Albertsons, slip op. at 20 (emphasis added) (citation omitted).

Indeed, although the *Advocates* case was not before it, the Supreme Court went out of its way to endorse the decision reached by the Court of Appeals, noting that is was Ahardly surprising that . . . the waiver regulations were struck down for failure of the FHWA to support

[27] The Court was adjudicating the issuance of a waiver pursuant to 49 U.S.C. ' 31136(e), which has since been transmuted into exemptions under 49 U.S.C. ' 31315.

its formulaic finding of consistency with public safety. See *Advocates for Highway Safety v. FHWA,* 28 F.3d 1288, 1289 (CADC 1994).@ *Id.,* at note 21. The Court went on to emphasize that the agency has tried to have things both ways.

> [The agency] has said publicly, based on reviews of the data collected from the waiver program itself, that the drivers who obtained such waivers have performed better as a class than those who satisfied the regulation. [Citations omitted]. It has also noted that its medical panel has recommended >leaving the visual acuity standard unchanged,=see 64 Fed. Reg. 16518 (1999) [citations omitted], a recommendation which the FHWA has concluded supports its >view that the present standard is reasonable and necessary as a general standard to ensure highway safety.= 64 Fed. Reg. 16518 (1999).

Id.

The Supreme Court concluded that employers do not have the burden of defending their reliance on existing safety standards in the FMCSRs in the face of FHWA waivers. According to the Court, were it otherwise,

> [t]he employer would be required in effect to justify *de novo* an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government=s own wheel when the Government merely had begun an experiment to provide data to consider changing the underlying specifications.

Id. at 22.

It is clear from the Supreme Court=s opinion that whatever validity the Vision Waiver Program may have had (and Advocates does not concede that it ever had any scientific validity), was based on the premise of collecting empirical data in order to revise the visual acuity standard. This was the announced purpose of the program and the basis for data collection methodology. The Vision Waiver Program was not conceived or designed to serve any other legitimate scientific purpose. Since the program was subsequently discontinued by court order, and since the agency has acknowledged that the data collected is not sufficient to revise the existing standard, there is no appropriate use to which the data can properly be applied, including as a basis for justifying the grant of vision exemptions. Advocates does not accept, and neither FHWA nor OMCS has proven, that data collected about drivers who voluntarily participated in the Vision Waiver Program can be used as the basis for granting exemptions (waivers) to drivers who did not participate in that program. There is no credible basis for making such an extrapolation, particularly when the FMCSA claims it is making individual assessments of each applicant. The Supreme Court=s discussion in *Albertsons* supports Advocates= view that the agency cannot fairly and credibly rely on data collected in the discredited Vision Waiver

Program. The Supreme Court was eloquent in its conclusion that vision waivers are not a credible substitute for the underlying standard. Since the data collected in the program cannot be used for its intended purpose to revising the vision standard, it cannot and must not be used for any other legal, regulatory, or policy purpose, including the justification for issuing exemptions from the vision standard.

In previous notices regarding the Vision Waiver Program and vision exemptions, FHWA persistently invoked the Americans with Disabilities Act (ADA) as the rationale for the Vision Waiver Program and the subsequent issuance of vision waivers, now referred to as exemptions. During the Vision Waiver Program litigation in federal court, and even after the Court of Appeals nullified that program, the FHWA steadfastly maintained that the issuance of vision waivers was required in order to comply with the ADA. Advocates has long contended that the ADA does not override existing safety standards contained in the FMCSRs, and that the issuance of waivers is not a viable means of addressing requirements in the vision standard and other medical and physical qualifications for commercial drivers that are purported to be overly stringent. We were gratified to read that OMCS admitted that the ADA Adoes not apply to the Federal regulations.@ 64 Fed. Reg. 66965; *see also* 64 Fed. Reg. 66965. Thus, the OMCS at least agreed that the vision waiver program and other programs of its kind, including waivers and exemptions, are not statutorily required by the ADA. This admission should lead the agency to reevaluate its position under the lower court decision in *Rauenhorst v. U.S. DOT, FHWA,* 95 F. 3d 715 (1996). That decision, which predates the U.S. Supreme Court opinion in *Albertsons,* was predicated on the assumption that the ADA applied to federal safety and medical qualification standards. Since the OMCS admitted that this is not the case, and in light of the Supreme Court decision more narrowly interpreting the ADA, the FMCSA should reassess its policy of granting numerous exemptions to the vision standard.

While it may be technically correct that the decision in *Albertsons* does not *Adirectly* affect the exemption program,@ 64 Fed. Reg. 66965 (emphasis added), it is very clear that from a factual standpoint the Court disdained the agency grant of waivers in such an arbitrary and capricious manner. Clearly, the Supreme Court did not place much credence in the waivers issued by FHWA since it determined that employers subject to the federal requirements were free to ignore the waivers and did not have to hire drivers who held waivers. The common sense impact of the Court=s decision is equally applicable to exemptions issued by the FMCSA. Advocates has always maintained that the appropriate procedure is to revise the standards based on relevant and sufficient medical and safety information. In *Albertsons,* the Supreme Court unanimously agreed with this position.

In reaching its decision, the Supreme Court discussed the legislative history of the ADA. As Advocates had previously contended, the Court concluded that A[w]hen Congress, enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law.@ *Albertsons, slip op.* at 18. The Court cited the understanding of Congress that A >a person with a disability applying for or currently holding a job subject to [DOT standards for

drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under Title I of the legislation.= S. Rep. No. 101-116, pp. 27-28 (1998) [sic].@ *Id.* The relevant Congressional committees did request that the Secretary of Transportation conduct a thorough review of knowledge about disabilities and make required changes within 2 years of enactment of the ADA. While FHWA and OMC failed to conduct such a review of the FMCSRs and medical qualifications in general, a subsequent review of the vision standard by FHWA found no empirical evidence on which to base any change in that standard. Thus, the waiver program did not fulfill the Congressional request to make necessary changes to the standards following a review because Athe regulations establishing the vision waiver program did not modify the general visual acuity standards.@ *Albertsons, slip op.* at 18. It cannot be contended that Congress, in enacting the ADA, sought to undermine existing safety standards on an *ad hoc* basis by permitting the employment of persons who do not meet the extant safety requirements mandated by the Department of Transportation. As a result, the Supreme Court concluded that it

> is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government=s sole substantive visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation=s application according to its own terms.

Id. at 22.

In light of the decision in *Albertsons,* the FMCSA must revisit the position previously taken by both FHWA and OMCS, re-evaluate the significance of the lower court decision in *Rauenhorst v. U.S. DOT,* and reconsider the agency=s policy of issuing experimental vision exemptions based on surrogate criteria for visual performance requirements.

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